Filed 7/6/12 In re Andrew C. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ANDREW C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ANDREW C., Defendant and Appellant.	F062363 (Super. Ct. No. JJD063953) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Juliet L. Boccone, Judge.

Thea Greenhalgh, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Poochigian, J. and Franson, J.

It was alleged in a juvenile wardship petition filed September 1, 2010, that appellant, Andrew C., a minor, committed two counts of second degree robbery (Pen. Code, §§ 211, 212, subd. (c); counts 2, 5) and individual counts of the following offenses: kidnapping during the commission of a carjacking (Pen. Code, § 209.5, subd. (a); count 1), carjacking (Pen. Code, § 215, subd. (a); count 3), attempted carjacking (Pen. Code, §§ 664, 215.5, subd. (a); count 4), unlawfully dissuading a witness by force or threat (Pen. Code, § 136.1, subd. (c)(1); count 6), and attempted unlawful taking or driving of a vehicle (Pen. Code, § 664; Veh. Code, § 10851, subd. (a); count 7). At the jurisdiction hearing, on December 14, 2010, the court found true all allegations except for count 7, which it dismissed as not proved true beyond a reasonable doubt.

On April 19, 2011, at the subsequent disposition hearing, the court adjudged appellant a ward of the court, ordered him committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice and set his maximum term of physical confinement at seven years to life plus nine years two months, based on the instant offenses and offenses adjudicated in a prior wardship proceeding.

On appeal, appellant contends (1) the evidence was insufficient to support his adjudication of the count 4 attempted carjacking, and (2) the juvenile court erroneously considered evidence of other misconduct by appellant, thereby impermissibly lessening the prosecution's burden of proof as to count 4, in violation of his due process rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Count 7 – Alleged Attempted Vehicle Theft[1]

Miguel Reya testified to the following: At approximately 6:45 p.m., on August 30, 2010 (August 30), he walked out of the apartment at 671 East Isham in Porterville that he shared with his cousin and saw appellant and J.G. One of the boys was sitting in the driver's seat of a car that Reya's cousin regularly drove and which was parked in front of the apartment. The other boy was standing "at the door" of the car on the driver's side, approximately 20 inches from the car, holding a bottle partially filled with "[a]lcohol."[2] The driver's side door was open, and the boy sitting in the driver's seat was "moving around" in such a way that it appeared he was "trying to turn it on." "As soon as [Reya] saw [appellant and J.G.], they got out of the car" and began walking away at a "leisurely" pace. Reya got in his car, which was also parked in front of the apartment, and followed appellant and J.G., for approximately three or four minutes. However, he "lost them."

Count 4 – Attempted Carjacking of Nico Castro[3]

Later that same evening, at a point when it was "beginning to get dark," Nico Castro drove to the home of his cousins at 741 East Orange in Porterville, stopped the car, and got out. He went to open the gate, and as he was doing so, two persons, whom Castro identified in court as appellant and another minor, J.G., came running toward him. Castro got back in the car, and the doors automatically locked as he put the car in gear.

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1 As indicated above, the court found this count not true. We include a summary of the evidence relating to this count because such evidence is relevant to the issues raised on appeal. Counts 5 and 6 are not relevant to our analysis and therefore we do not include a summary of the facts underlying those offenses.

2 Reya did not specify which boy was sitting in the car and which was standing outside it.

3 Except as otherwise indicated, our summary of the facts of this offense is taken from Castro's testimony.

Appellant and J.G. ran up to the passenger side of the car. One of them was carrying a half-full "bottle[] of liquor." They were speaking to Castro in English, in "a normal tone of voice," but Castro, who speaks only Spanish, could not understand them. Either appellant or J.G.—Castro did not see which one—"tapped" on the window, as if "calling ... for [Castro] to pay attention to him," and J.G. "tried to open" the passenger side door. On cross-examination, Castro indicated he was unable to see the door handle or "anyone actually trying to open the door ...."

Appellant and J.G. ran away "[w]hen ... the lady came out saying that they had stolen ...."[4] They ran in the direction of the "810 market." Before they fled, while Castro was inside the car and appellant and J.G. were outside the car, Castro thought appellant and J.G. "were going to steal [the] car ...."

City of Porterville Police Detective Aaron Sutherland testified that he "obtain[ed] a statement from Nico Castro" and that Castro stated the following: "[B]oth subjects who approached the vehicle had attempted to open the passenger side [door]." Both appellant and J.G. "appeared angry" and were "were yelling at [Castro]."

Counts 1, 2 and 3 - Kidnapping, Robbery and Carjacking of Jorge Lopez[5]

Still later that August 30 evening, Jorge Lopez drove his 1996 GMC "Blazer" automobile to the "810 market" in Porterville. He was drinking a soda as he got back into his car, at which point he realized to his surprise that there were two people in the car with him: J.G., who was in the front passenger seat, and appellant, who was in the back seat, on the passenger side. "[T]hey" had a bottle containing tequila, and both of them appeared to be drunk.

J.G. told Lopez to start the car and drive. Afraid that "they might do something to [him]," Lopez started the car and drove off. He drove for approximately two or three

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4 This evidence was admitted only to show the reason appellant and J.G. fled, and not for the truth of the statement that "they had stolen ...."

5 Our summary of the facts of these offenses is taken from Lopez's testimony.

minutes, "down Orange ...." When he reached Main and Orange, J.G. "threatened" him with a screwdriver. Lopez got out of the car and J.G. and appellant drove off.

California Highway Patrol Officer Michael Yan was on duty on August 30 when, at approximately 7:00 p.m., he received a dispatch report that included a description of a "suspect vehicle." At approximately 7:27 p.m. that evening, he saw a vehicle meeting the description, and thereafter he effected a stop of the vehicle. It was the one Lopez had been driving. There were two persons in the vehicle, J.G., who was driving, and appellant.

Other Evidence

Detective Sutherland testified that the residence at 741 East Orange in Porterville and the "8-10 Market" are approximately 20 yards apart and 671 East Isham in Porterville is approximately 200 yards away from those two locations.

The Juvenile Court's Ruling

In finding the count 4 attempted carjacking allegation true, the court stated: "the obvious common scheme and plan that was demonstrated by going from one car to the next is sufficient to support the intent with regard to ... Count 4 .... [¶] And the Court does feel that there was sufficient evidence to prove beyond a reasonable doubt that that was their intent. And it was a specific intent that was demonstrated by the manner in which they carried that out."

DISCUSSION

Sufficiency of the Evidence of Attempted Carjacking

"An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission." (Pen. Code, § 21a.) Thus, "When a defendant acts with the requisite specific intent, that is, with the intent to engage in the conduct and/or bring about the consequences proscribed by the attempted crime [citation], and performs an act that 'go[es] beyond mere preparation ... and ... show[s] that the perpetrator is putting his or her plan into action'

[citation], the defendant may be convicted of criminal attempt." (*People v. Toledo* (2001) 26 Cal.4th 221, 230.) "*Carjacking* is the felonious taking of a motor vehicle in the possession of another or from her person or immediate presence against her will and with the intent to either *permanently or temporarily* deprive the victim of possession of her car, accomplished by force or fear. [Citations.]" (*People v. Marquez* (2007) 152 Cal.App.4th 1064, 1067-1068.) Therefore, in the instant case, the People had the burden of proving beyond a reasonable doubt that appellant had the specific intent to permanently or temporarily deprive Nico Castro of his car, and that he committed a direct but ineffectual act toward that end.

Appellant contends the evidence was insufficient to establish either the specific intent or the direct-but-ineffectual-act elements of attempted carjacking, and therefore his adjudication of that offense cannot stand. Specifically, he argues that the evidence that appellant and/or J.G. tried to open the car door—evidence he characterizes as speculation by Castro—was not sufficient to establish that appellant committed the requisite act, and that the evidence of his "subsequent conduct," i.e., the kidnapping, robbery and carjacking of Jorge Lopez, provides no support for the conclusion he acted with the requisite specific intent.

Standard of Review

In general, in determining whether the evidence is sufficient to support a finding in a juvenile court proceeding the reviewing court is bound by the same principles as to sufficiency and the substantiality of the evidence which govern the review of criminal convictions generally. (*In re Roderick P.* (1972) 7 Cal.3d 801, 809.) Those principles include the following: We resolve neither credibility issues nor evidentiary conflicts. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "[T]he reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable

doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "Reversal on this ground [i.e., insufficiency of the evidence] is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the adjudication]." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence." (*In re Michael D.* (2002) 100 Cal.App.4th 115, 125.) "'[W]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].'" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394, italics omitted.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Analysis

As we explain below, (1) Detective Sutherland's testimony that Castro told him appellant tried to open the locked door of Castro's car, considered in conjunction with (2) the evidence of another crime or act, specifically the Lopez carjacking and the actions surrounding the alleged vehicle theft, constitute substantial circumstantial evidence that appellant committed attempted carjacking as alleged in count 4.[6]

Appellant challenges both of these points. First, he argues that the evidence was insufficient to establish that, as Castro told Detective Sutherland, appellant attempted to

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6 We recognize that the evidence of Castro's statement to the detective that both appellant and J.G. tried to open the car door is in conflict with Castro's testimony that only J.G. did so. However, under the principle that all conflicts are resolved in favor of the judgment, the juvenile court could credit the detective's version. We express no opinion as to whether Castro's testimony was sufficient to establish that appellant committed the count 4 offense as an aider and abettor rather than as a perpetrator.

open the car door. Appellant bases this contention on Castro's testimony that he (Castro) could not see the door handle and therefore did not actually *see* either appellant or J.G. try to open the door. In the absence of direct observation, appellant contends, Castro's assertion that appellant tried to open the car door is mere speculation. Such speculation, he argues further, can provide no support for the judgment. We disagree.

An opinion is "an *inference* from facts observed." (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 1.) For lay opinion testimony to be admissible, it must be, among other things, "[r]ationally based on the perception of the witness[.]" (Evid. Code, § 800;[7] *People v. Chapple* (2006) 138 Cal.App.4th 540, 547.) This requirement is an application of the personal knowledge rule, i.e., the rule set forth in section 702, subdivision (a) that except where an expert witness gives an opinion in justifiable reliance on information from others, "'the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. [Citations.]'" (2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 46 ["knowledge requirement also applies to lay witness' opinion testimony; i.e., such an opinion must be '[r]ationally based on the perception of the witness'"].) This rule applies to statements made by hearsay declarants, as well as the testimony of live witnesses. (*People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104 [when an out-of-court statement is offered for its truth, the hearsay declarant must have personal knowledge of the fact(s) stated].)

Appellant's argument is, in effect, that Castro's statement, as reported by Detective Sutherland, that appellant tried to open the car door is, in the terms of the Witkin formulation, an "inference" unsupported by "facts observed." Because Castro testified he could not see the door handle, appellant suggests, the record does not establish that Castro had personal knowledge that appellant was trying to open the door. Appellant, however, did not object to the statement, and "'"It is settled law that

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[7] Except as otherwise indicated, all further statutory references are to the Evidence Code.

incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding. [Citations.]"'" (*People v. Panah* (2005) 35 Cal.4th 395, 476.)[8] "[A] reviewing court must consider all of the evidence admitted at trial when considering [an insufficiency of the evidence] claim." (*McDaniel v. Brown* (2010) 558 U.S. __ [130 S.Ct. 665, 672, L.ED.2d 582].) "'"Evidence technically incompetent admitted without objection must be given as much weight in the reviewing court in reviewing the sufficiency of the evidence as if it were competent. [Citations.]"'" (*People v. Bailey* (1991) 1 Cal.App.4th 459, 463.) Therefore, even if the statement would have been excludable in the face of a proper objection, in the absence of such an objection it cannot be successfully urged on appeal that the statement was insufficient to establish that appellant tried to open the door. Appellant's attempt to open the car door was a "direct but ineffectual act" toward the commission of a carjacking, within the meaning of Penal Code section 21a.

Appellant also argues that "[t]he juvenile court here relied on the theory of common plan to find specific intent to carjack as alleged in count [4]," and that despite some "[g]eneric similarities," the "acts alleged as supporting [the allegations of the kidnapping, robbery and carjacking of Jorge Lopez] were significantly dissimilar" to the acts upon which the attempted carjacking allegation was based, and were therefore insufficient to establish that both the count 4 offense and the crimes against Lopez were

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8 At one point, after the court overruled appellant's hearsay objection (§ 1200) to questioning of Detective Sutherland as to whether Castro told him both minors attempted to open the car door, counsel for J.G. stated: "My concern with this whole line of questioning, Mr. Castro also testified he couldn't see the door handle. We're doing speculation as to whether he told the officer two people or whether it was one person." The court responded: "And that can certainly be ... your argument at closing. I'm saying this is his interest statement to the officer [*sic*]." Assuming for the sake of argument that counsel's statement can be construed as an objection on opinion and/or personal knowledge grounds, counsel for appellant did not join in that objection.

committed pursuant to a "common scheme or plan." Thus, he argues further, the other crimes evidence was insufficient to establish the specific intent element of the attempted carjacking allegation. Appellant bases this argument on section 1101 and cases interpreting that statute, such as *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*). Appellant's claim is without merit.

"Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. Subdivision (b) of section 1101 clarifies, however, that this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*Ewoldt, supra,* 7 Cal.4th at p. 393.) Thus, evidence of "a crime ... or other act" (§ 1101, subd. (b)) can be admissible to prove various factors, including intent (*ibid*.) and that "[the] defendant committed the charged offenses pursuant to the same design or plan [the] defendant used to commit the uncharged misconduct." (*Ewoldt, supra,* at p. 393).

Appellant's argument misses the mark for at least two reasons. First, section 1101 is a rule of admissibility of evidence; the statute does not tell us whether evidence of specific instances of conduct can be *sufficient* to establish the specific intent element of a charged offense. And second, the court did not conclude, as appellant seems to assert, that the evidence of the Lopez carjacking and appellant's actions surrounding the alleged vehicle theft were admissible against him under section 1101, subdivision (b) with respect to count 4 on a "common design or plan" (*Ewoldt, supra,* 7 Cal.4th at p. 402) rationale. Rather, the juvenile court ruled that the "common plan or scheme that was demonstrated from going from one car to the next" was "sufficient to support the *intent* [element of the attempted carjacking allegation]." (Italics added.)

On the question of whether this conclusion can be upheld, we find instructive *People v. Ramirez* (2006) 39 Cal.4th 398 (*Ramirez*) and *People v. Prince* (2007) 40

Cal.4th 1179 (*Prince*), which essentially hold that evidence of other offenses, both before and subsequent to the crime charged, are admissible to show intent. In *Ramirez*, our Supreme Court upheld the defendant's convictions of multiple felonies, including 14 counts of burglary. (*Ramirez*, *supra*, 39 Cal.4th at pp. 407, 463.) One of the elements of burglary is the specific intent to commit larceny or theft. (*Id.* at p. 463.) There was evidence that in one of the burglaries, the defendant entered the victims' condominium but escaped moments later when one of the victims opened the garage door and fled. The defendant argued the evidence was insufficient to support the intent element on this count "because '[t]here was no evidence of theft, ransacking, or attempted taking of property.'" (*Id*. at p. 462.) However, "with only one exception, there was evidence of the theft of property in each of the other charged crimes in which defendant entered a residence." (*Id*. at p. 463.) Based on this evidence, the court concluded, "The evidence is overwhelming that one of defendant's purposes in entering [the victims'] residence was to steal." (*Ibid*.)

In *Prince*, the defendant was convicted of multiple murders, burglaries and other offenses, including two attempted burglaries of the apartment occupied by Stephanie Squires and Sarah Canfield. (*Prince*, *supra*, 40 Cal.4th at pp. 1196, 1255.) The first occurred on April 25, 1990. On that day, Squires saw the defendant, an African-American man, follow her to the pool in her apartment complex. Squires later left the pool area and returned to her apartment. A neighbor saw an unidentified African-American man walk up the stairs to Squires's apartment and try the door handle. (*Id*. at p. 1196.) That was all of the evidence submitted specific to the April 25 crime.

The second attempted burglary in this sequence occurred three days later, when Canfield heard a knock at the apartment door and saw the door handle moving. She looked out and saw the defendant standing at the door. The defendant's car was seen leaving the apartment complex parking lot. (*Prince*, *supra*, 40 Cal.4th at pp. 1196, 1255-1256.) Other crimes of which the defendant was convicted also involved the defendant

attempting to gain entry to a victim's residence by trying the front doorknob, and several crimes were perpetrated against young women while or shortly after the victim was sunbathing near her residence or exercising at a particular local gym. (*Id.* at pp. 1191 [count 1], 1194 [counts 5 and 6], 1196-1197 [count 9], 1198 [count 12], 1200-1201 [count 16], 1202 [counts 19 and 20], 1203 [counts 22 and 23], 1203-1204 [count 24], 1204 [count 26], 1204-1205 [count 27].) In addition, there was evidence property had been stolen in 10 of the burglaries of which appellant was convicted. (*Id.* at pp. 1196 [count 6], 1198 [counts 11, 12], 1199 [count 15], 1200-1201 [count 16], 1201 [count 17], 1202 [counts 18, 20], 1203 [count 23], 1204 [count 26].)

Citing to *Ramirez*, the court held: "A jury reasonably could infer, particularly in light of the modus operandi involved in many of the other crimes, that the man who tried the door on both occasions was defendant. For the same reason, a jury reasonably could determine that his intent was, in part, theft." (*Prince*, *supra*, 40 Cal.4th at p. 1256.)

Here, the evidence of another subsequent crime and the earlier act, very close in time, circumstantially support the proposition that appellant, like the defendants in *Ramirez* and *Prince*, had the specific intent to commit the charged offense. *Prince* is especially instructive because in that case the defendant's otherwise ambiguous act of trying to open the apartment door was similar to appellant's act of trying to open the door of Castro's car. The evidence in the instant case showed that appellant, in addition to trying to force his way into Castro's car on the evening of August 30, (1) engaged in conduct strongly suggestive of a thwarted vehicle theft, apparently earlier that evening, and (2) successfully completed a carjacking later that evening after his encounter with Castro,[9] and that all these acts took place within close physical proximity to each other.

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9 The precise sequence of events is not entirely clear. Obviously, appellant committed the kidnapping, carjacking and robbery of Lopez after the other conduct at issue, given that he was apprehended while riding in the carjacked vehicle. The sequence of events is less clear with respect to the alleged vehicle theft and the count 4 attempted Castro carjacking. As indicated above, the evidence showed that the alleged vehicle theft

This evidence of conduct similar to that underlying the count 4 allegation, and occurring in close temporal and spatial proximity to that conduct, both before and after the conduct underlying count 4, was sufficient to establish that appellant had the specific intent to carjack Castro. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 917 ["probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses[] [and] the close proximity in time of the offenses"]; *People v. Beamon* (1973) 8 Cal.3d 625, 632 [evidence of *prior* robberies admissible to show, inter alia, defendant's intent]; *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1335 ["most cases deal with questions of admissibility of evidence of prior crimes or misconduct, but evidence of crimes or misconduct committed after the charged incident may also have relevance"]; *Prince*, *supra*, 40 Cal.4th at pp. 1194-1196, 1197-1204 [specific intent established by multiple uncharged crimes occurring both before and after charged offense]; *Ramirez*, *supra*, 39 Cal.4th at pp. 407-416 [specific intent established by multiple uncharged crimes occurring after charged offense].)

In summary, we conclude the evidence was sufficient to establish that appellant committed a direct but ineffectual act toward the commission of a carjacking, with the specific intent to commit that offense. We therefore uphold appellant's adjudication of attempted carjacking.

Due Process

Appellant contends the prosecution's burden of proof was "impermissibly lessened" by the juvenile court's "improper consideration" of the other crimes/acts evidence, in violation of appellant's due process rights under the United States and California Constitutions. However, he failed to object below to this evidence on due

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occurred around 6:45 p.m. and the conduct underlying count 4 occurred as it was beginning to get dark. The prosecutor asserted in closing argument that the incident of alleged vehicle theft was the first event in the sequence, followed next by the attempted carjacking, and this assertion went unchallenged.

process grounds, and therefore he has not preserved the issue for appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 869 [defendant waives constitutional claims by failing to articulate them to the trial court].)

In any event, appellant's claim also fails on the merits. In order to be admissible under section 1101 to prove intent, evidence of other crimes and/or acts must meet two requirements. First, "[it] must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance. [Citations.]"'" (*Ewoldt, supra,* 7 Cal.4th at p. 402.) Of all the factors that can be proved with evidence of other crimes and/or acts, the least degree of similarity between the uncharged act and the charged offense is required in order to prove intent. (*Ibid*.) In addition, the probative value of the other crimes/acts evidence "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) For the same reasons that we conclude the other crimes/acts evidence supports the specific intent element of attempted carjacking—the similarity of the conduct underlying those offenses to the conduct upon which the count 4 offense is based and the timing and location of both the charged and uncharged acts—we conclude that the challenged evidence satisfies both these requirements. And because this evidence was properly admitted, we necessarily reject appellant's constitutional claim. (*People v. Cole* (2004) 33 Cal.4th 1158, 1197, fn. 8.)

DISPOSITION

The judgment is affirmed.